

DOCUMENT INDEX

Donald Sweeting
v.
Jason Kishaba, et al.
First Action: (OCSC Case No. 30-2008-104237)

Donald Sweeting
v.
GMAC Mortgage, LLC
Second Action: (OCSC Case No. 30-2010-00410079)

Appeals/Related Appeals:
G043281
G043924
G045198

NO.	DESCRIPTION
A1	Verified First Amended Complaint
A2	Verified Second Amended Complaint
B	December 3, 2009 Dismissal Judgment
C	June 28, 2010 Appeal Dismissal Order
D	Remittitur issued by the California Appellate Court on July 20, 2010
E	August 27, 2010 California Appellate Court Denial of Claimant's Motion to Recall the Remittitur
F	GMAC Mortgage's Demurrer to the Second Amended Complaint
G	GMAC Mortgage's Motion to Strike the Second Amended Complaint
H	September 15, 2010 Court Order Granting GMAC Mortgage's Motion to Strike Without Leave to Amend
I	2010 Complaint in <i>Sweeting v. GMAC Mortgage, LLC</i> – Case No. 30-2010-00410079
J	February 7, 2011, GMAC Mortgage's Demurrer to the 2010 Complaint
K	Order Sustaining GMAC Mortgage's Demurrer to the 2010 Complaint Without Leave to Amend
L	Court Order Dismissing the Second Sweeting Action with Prejudice/Minute Order
M	Briefing on Second Appeal

EXHIBIT **“A1”**

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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MAR 24 2008

ALAN SLATER, Clerk of the Court

BY: A. HERRO, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE

ROBERT SWEETING

Case No. 30-2008-104237

Plaintiff,

VERIFIED FIRST AMENDED
COMPLAINT FOR:

v.

JASON KISHABA, an individual; SANDRA
JAQUEZ, an individual;
PETER SAUERACKER, an individual; INTERNATIONAL
MORTGAGE, INC.; CAITLIN
CHEN, an individual;
FREMONT INVESTMENT AND
LOAN, INC.; GMAC MORTGAGE
LLC.; all persons
unknown, claiming any
legal or equitable right,
title, estate, lien or
interest in the property
described in the
complaint adverse to
plaintiff's title, or any
cloud on plaintiff's
title thereto and DOES 1
through 25, inclusive,

Defendants.

1. NEGLIGENCE;
2. NEGLIGENT MISREPRESENTATION;
3. FRAUD/INTENTIONAL MISREPRESENTATION;
4. CONSPIRACY TO COMMIT FRAUD;
5. CANCELLATION OF WRITTEN INSTRUMENT;
6. TEMPORARY RESTRAINING ORDER/PRELIMINARY AND PERMANENT INJUNCTION;
7. BREACH OF FIDUCIARY DUTY;
8. QUIET TITLE;
9. BREACH OF CONTRACT;
10. VIOLATION OF BUSINESS & PROFESSIONS CODE §17200;
11. BREACH OF GOODFAITH AND FAIR DEALING;
12. VIOLATION OF TRUTH AND LENDING ACT; and
13. CONVERSION.

Plaintiff, ROBERT SWEETING, (hereinafter alternatively
"Plaintiff/SWEETING") alleges as follows:

VERIFIED FIRST AMENDED COMPLAINT - 1

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ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

1. Defendant, JASON KISHABA, (hereinafter alternatively "Defendant/KISHABA") is an individual residing in Orange County, California.

2. Defendant, SANDRA JAQUEZ, (hereinafter alternatively "Defendant/JAQUEZ") is an individual residing in Orange County, California.

3. Defendant, PETER SAUERACKER, (hereinafter alternatively "Defendant/SAUERACKER") is an individual residing in Orange County, California.

4. Defendant, INTERNATIONAL MORTGAGE, INC. (hereinafter alternatively "Defendant/INTERNATIONAL") is a business entity, form unknown, conducting business within the County of Orange, State of California.

5. Defendant, CAITLIN CHEN, (hereinafter alternatively "Defendant/CHEN") is an individual residing in Orange County, California.

6. Defendant, FREMONT INVESTMENT AND LOAN, INC. (hereinafter alternatively "Defendant/FREMONT") is a business entity, form unknown, conducting business within the County of Orange, State of California.

7. Defendant, GMAC MORTGAGE LLC., (hereinafter alternatively "Defendant/GMAC") is a business entity, form unknown, conducting business within the County of Orange, State of California.

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1 8. Plaintiff is informed, believes, and thereon alleges
2 that INTERNATIONAL consisted of a mortgage brokerage and escrow
3 company that handled the plaintiff's refinance loan and escrow
4 related to the loan.

5
6 9. Plaintiff is informed, believes, and thereon alleges
7 that SAUERACKER was an employee of INTERNATIONAL who was
8 responsible for plaintiff's refinance loan.

9
10 10. Plaintiff is informed, believes, and thereon alleges
11 that FREMONT was the lender on his refinance loan transaction.

12 11. Plaintiff is informed, believes, and thereon alleges
13 that JAQUEZ was an employee of INTERNATIONAL who was responsible
14 for plaintiff's escrow.

15 12. Plaintiff is informed, believes, and thereon alleges
16 that CHEN was the broker of record for INTERNATIONAL during the
17 pendency of plaintiff's refinance loan and escrow.

18
19 13. Plaintiff is unaware of the true names and capacities
20 of defendants sued herein as Does 1 through 25, inclusive, and
21 therefore sues such defendants under the provisions of Section
22 474 of the *California Code of Civil Procedure*.

23 14. Plaintiff is informed, believes, and thereon alleges,
24 that at all times relevant hereto, defendants, and each of them,
25 were agents, servants, and employees of each of the remaining co-
26 defendants, and in doing the things herein alleged, were acting
27 within the purpose and scope of such agency, service and
28

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1 employment, with the permission, consent, and knowledge of each
2 of the remaining co-defendants.

3 15. The defendants herein named as "all persons unknown,
4 claiming any legal or equitable right, title, estate, lien or
5 interest in the property described in the complaint adverse to
6 plaintiff's title, or any cloud on plaintiff's title thereto"
7 (hereinafter "UNKNOWN DEFENDANTS") are unknown to plaintiff.
8 These UNKNOWN DEFENDANTS, and each of them, claim some right,
9 title, estate, lien, or interest in the hereinafter-described
10 property adverse to plaintiff's title and their claims, and each
11 of them, constitute a cloud on plaintiff's title to that
12 property.
13

14 16. Plaintiff is ignorant of the true names and capacity
15 of defendants sued in this complaint as DOES 1 through 25,
16 inclusive, and therefore sues these defendants by these
17 fictitious names. Plaintiff will amend this complaint once the
18 true names and capacities are ascertained. The Plaintiff is
19 informed, believes, and thereon alleges that each of the
20 fictitiously named defendants are responsible in some manner for
21 the occurrences herein alleged, and that the plaintiff's damages
22 as herein alleged were proximately caused by their conduct.
23 Plaintiff is informed, believes, and thereon alleges that each of
24 these fictitiously named defendants claim some right, title,
25 estate, lien or interest in the hereinafter-described property
26
27
28

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1 adverse to plaintiff's title, and their claims, and each of them,
2 constitute a cloud on plaintiff's title to that property.

3 17. At all times relevant hereto, the defendants KISHABA,
4 JAQUEZ, SAUERACKER, INTERNATIONAL, CHEN, FREMONT, GMAC, and Does
5 1 to 25 acting alone or as agents, or as employees, affiliates,
6 or "nominees", or in concert with one another or other
7 defendants, in the ordinary course of their business, regularly
8 extend or offered to extend consumer credit, for which a finance
9 charge is imposed or which, by written agreement, is payable in
10 more than four installments and is the person to whom the
11 transaction which is the subject of this action is initially
12 payable, making defendants a creditor within the meaning of
13 TILA, 15 U.S.C. §1602(f) and Regulation Z §226.2(a)(17) or an
14 assignee within the meaning of 15 U.S.C. §1641.

15 18. Defendant GMAC, as "nominee for the lender" or any
16 other person or entity holds a security interest in the
17 plaintiff's home located at 16077 Crete Lane, Huntington Beach,
18 California 92649.

19 19. The real property that is the subject matter of this
20 litigation is plaintiff's home of twenty-two (22) years located
21 at 16077 Crete Lane, Huntington Beach, California 92649 and
22 legally described as follows:

23 PARCEL 1

24 LOT 30 OF TRACT NO. 9924, IN THE CITY OF
25 HUNTINGTON BEACH, COUNTY OF ORANGE, STATE OF

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1 CALIFORNIA, AS PER MAP RECORDED IN BOOK 431 PAGES
2 22 AND 23 OF MISCELLANEOUS MAPS, IN THE OFFICE OF
3 THE COUNTY RECORDER OF SAID COUNTY.

4 PARCEL 2

5 AN EASEMENT FOR USE AND ENJOYMENT OF THE COMMON
6 AREA, BEING LOT 46 OF SAID TRACT NO. 9924,
7 REFERRED TO IN PARCEL 1 ABOVE, AS SET FORTH IN
8 THE DECLARATION OF COVENANTS, CONDITIONS AND
9 RESTRICTIONS RECORDED IN BOOK 12914 PAGE 929, ET
10 SEQ., OF OFFICIAL RECORDS OF ORANGE COUNTY,
11 CALIFORNIA.

12 APN# 178-741-30

13 (hereinafter "SUBJECT PROPERTY").

14 20. On or about May 2006, plaintiff began discussing
15 refinancing the SUBJECT PROPERTY with one of his business
16 clients, Mr. Robbie De Capua who works for Ramsey Group Financial
17 Services.
18

19 21. Mr. De Capua was unable to complete a refinance of
20 the subject property, but brought plaintiff KISHABA as a partner
21 who worked for M&M and Associates Mortgage Brokers to complete
22 the loan.
23

24 22. Mr. De Capua and KISHABA promised plaintiff to
25 refinance the SUBJECT PROPERTY at a fixed annual percentage rate
26 of 7.5%, with a one-half point broker fee, a one-year prepayment
27 penalty, and one hundred five thousand dollars (\$105,000) cash
28 out.

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1 23. Beginning approximately in June 2006, KISHABA would
2 promise plaintiff that the refinance of the SUBJECT PROPERTY was
3 going to be completed that week, but he would come up with an
4 excuse for the failure to close and promise that it would close
5 any day.

6
7 24. Based on KISHABA'S representations that the loan
8 would close any day plaintiff stopped making his regular mortgage
9 payments.

10 25. In or about November 2006, KISHABA informed plaintiff
11 that KISHABA had changed employer and that he now worked for
12 INTERNATIONAL. KISHABA also informed plaintiff that he would
13 place the refinance of the SUBJECT PROPERTY with INTERNATIONAL as
14 the mortgage broker.

15
16 26. Throughout the time that plaintiff dealt with KISHABA
17 regarding the refinance of the SUBJECT PROPERTY, KISHABA
18 continually provided plaintiff documents that contradicted the
19 terms promised by KISHABA.

20
21 27. In fact, KISHABA had three separate loan document
22 signings for plaintiff which occurred on or about the beginning
23 of November 2006, December 5, 2006, and December 8, 2006.

24 28. In early November 2006, plaintiff was in Akron, Ohio.
25 KISHABA sent a notary public to plaintiff with loan documents to
26 sign. At this point, plaintiff was placed in a severe financial
27 bind by KISHABA'S prior representations that the loan would close
28 any day. When plaintiff looked over the documents that the notary

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1 brought, he noticed that the terms were not what KISHABA had
2 promised and that there was a two-year prepayment penalty instead
3 of the one-year prepayment penalty promised.

4 29. Plaintiff called KISHABA who said to just sign the
5 documents for the notary and that KISHABA would fix the problems
6 later. Plaintiff interlineated certain pages wherein he thought
7 the terms were not as promised and simply unacceptable. Plaintiff
8 handed the documents to the notary.
9

10 30. On or about December 5 2006, KISHABA sent another
11 notary to plaintiff's business. Again, the documents included
12 hidden terms that were contrary to KISHABA'S promised terms
13 including a two-year prepayment penalty. Plaintiff refused to
14 sign the page containing a two-year prepayment penalty, but
15 signed the remaining pages.
16

17 31. On or about November 22, 2006, FREMONT sent plaintiff
18 a letter and good faith estimate indicating an interest rate of
19 9.8% and broker fees of \$24,155. (First page [Second page
20 missing] of FREMONT Letter and Good Faith Estimate are attached
21 hereto as "Exhibit A" and incorporated by reference.)
22

23 32. On or about November 30, 2006, INTERNATIONAL created
24 a Borrower's Estimated Closing Costs document that indicated
25 plaintiff was to receive \$69,192.29 cash out on the refinance.
26 (Borrower's Estimated Closing Costs drafted by INTERNATIONAL and
27 dated November 30, 2006 is attached hereto as "Exhibit B" and
28 incorporated by reference.)

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1 33. On or about December 5, 2006, INTERNATIONAL created
2 another Borrower's Estimated Closing Costs document that
3 indicated plaintiff was to receive \$65,605.36 cash out on the
4 refinance. (Borrower's Estimated Closing Costs drafted by
5 INTERNATIONAL and dated December 5, 2006 [First page shows
6 letterhead that is cut off of second page] is attached hereto as
7 "Exhibit C" and incorporated by reference.)
8

9 34. On or about December 8, 2006, KISHABA came to
10 plaintiff's home with a notary to sign documents. At this point,
11 KISHABA informed plaintiff that because of plaintiff's bad
12 credit, which was directly related to the extended loan process
13 and KISHABA'S promises that the loan was closing "any day,"
14 plaintiff would only receive \$65,000 cash out.
15

16 35. Also on or about December 8, 2006, KISHABA had
17 plaintiff sign a Form 1003 Uniform Residential Loan Application.
18 (1003 Application Dated December 8, 2006 is attached hereto as
19 "Exhibit D" and incorporated by reference.)
20

21 36. Plaintiff also signed the Deed of Trust securing the
22 loan with the SUBJECT PROPERTY on December 8, 2006, which
23 necessarily precluded the required loan disclosures by
24 defendants.
25

26 37. On or about December 8, 2006, KISHABA promised
27 plaintiff that the February mortgage payment would be paid by
28 INTERNATIONAL from the loan proceeds. (See Amended Escrow

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1 Instructions dated December 20, 2006 attached hereto as "Exhibit
2 E" and incorporated by reference.)

3 38. Due to his reliance on KISHABA'S promise of a loan
4 closing "any day" beginning in June 2006, plaintiff accumulated
5 significant penalties, late fees, and suffered substantial damage
6 to his credit.
7

8 39. Because of the financial condition that KISHABA
9 placed plaintiff in, plaintiff signed the loan documents on
10 December 8, 2006, but did not see or sign any document indicating
11 that a two-year prepayment penalty would apply.
12

13 40. Each time that plaintiff signed documents KISHABA
14 failed to give a copy to plaintiff despite plaintiff's request
15 for copies, but promised that plaintiff would receive copies by
16 mail.
17

18 41. At no time during any of the document signings did
19 plaintiff receive any documents regarding the loan. Further,
20 plaintiff received no proper documentation regarding the
21 mandatory disclosures required by the Federal Truth and Lending
22 law including a three-day right to rescind this transaction.
23

24 42. Plaintiff eventually received blank notices of right
25 to cancel; however, there was no date indicating when the right
26 to cancel accrued of the time within which to rescind.

27 43. Plaintiff is informed, believes, and thereon alleges
28 that KISHABA used documents from all three document signings to
complete the final loan submission package.

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1 44. KISHABA mislead, lied, and lead a campaign of
2 confusion ever altering annual percentage rates, broker points,
3 fees, and prepayment penalties.

4 45. On or about December 20, 2006, JAQUEZ on behalf of
5 INTERNATIONAL sent plaintiff a document indicating that the
6 escrow was closed as of December 20, 2006, and that also
7 indicates plaintiff would be receiving a wire transfer in the
8 amount of \$25,128.44. (See Letter dated December 20, 2006
9 attached hereto as "Exhibit F" and incorporated by reference.)
10

11 46. On or about December 20, 2006, FREMONT recorded a
12 Deed of Trust dated December 8, 2006 securing a loan against the
13 SUBJECT PROPERTY in the amount of \$773,500. (See Deed of Trust
14 recorded December 20, 2006 attached hereto as "Exhibit G" and
15 incorporated by reference.)
16

17 47. On or about January 1, 2007, INTERNATIONAL faxed a
18 HUD-1 Statement indicating that plaintiff's cash out would be
19 \$67,906.85. (See HUD-1 faxed January 4, 2007 attached hereto as
20 "Exhibit H" and incorporated by reference.)
21

22 48. Despite the multiple promises and various amounts of
23 cash out listed, plaintiff never received any documentation or
24 information that he would receive less than \$65,605.36 cash from
25 the refinance transaction.
26

27 49. However, INTERNATIONAL sent only one wire to
28 plaintiff in the amount of \$25,128.44. Plaintiff did not receive

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1 any other payment from INTERNATIONAL or anyone in relation to the
2 refinance.

3 50. Thus, plaintiff's cash had gone down from the
4 original \$105,000 promised by KISHABA to \$65,605.36 listed in
5 loan and HUD-1 statements to actually receiving \$25,128.44.
6

7 51. Plaintiff called INTERNATIONAL to determine when he
8 was going to receive the remaining \$40,476.92. INTERNATIONAL
9 employees refused to tell plaintiff what happened to the
10 remaining funds or how they had applied those funds.
11 INTERNATIONAL further refused to provide plaintiff with any
12 further documents, deeds, notes, loan disclosures, escrow
13 documents, or HUD-1 Statements.
14

15 52. In or about March 2007, FREMONT contacted plaintiff
16 to inform him that the February 2007 payment was not paid, which
17 KISHABA had promised that INTERNATIONAL would pay from loan
18 proceeds. (See Exhibit E.)
19

20 53. According to FREMONT, no payment was made for the
21 loan payment due on February 1, 2007.

22 54. Plaintiff began trying to work with FREMONT to
23 discover the status of the missing \$40,476.92 and the missing
24 February 1, 2007 payment.

25 55. INTERNATIONAL, KISHABA, CHEN, JAQUEZ, and SAUERACKER
26 refused to communicate with plaintiff or offer any explanations
27 or solutions as to the missing payment or funds.
28

1 56. Plaintiff paid over \$17,000 to FREMONT; however,
2 FREMONT failed to properly apply and credit the payments.

3 57. On July 30, 2007, FREMONT sold plaintiff's loan to
4 GMAC. (See letter from FREMONT dated July 30, 2007 attached
5 hereto as "Exhibit I" and incorporated by reference.)
6

7 58. Plaintiff expected that he would receive a payment
8 booklet from GMAC and waited to begin making the payments until
9 he received the payment booklet.

10 59. Due to the actions of defendants in relation to the
11 funds that were never given to plaintiff and FREMONT'S
12 misapplication of plaintiff's payments, plaintiff was
13 substantially behind in payments by August 2008.
14

15 60. Plaintiff attempted on several occasions to have GMAC
16 investigate the missing funds, misapplied payments, and to work
17 out forbearance plans.

18 61. GMAC failed to properly account for and apply funds
19 plaintiff paid to FREMONT.
20

21 62. GMAC failed to properly account for and apply funds
22 plaintiff paid to GMAC.

23 63. On or about October 23, 2007, GMAC sent plaintiff a
24 Notice of Default and caused the same to be recorded with the
25 Orange County Recorder's Office. (See Notice of Default dated
26 October 23, 2007 attached hereto as "Exhibit J" and incorporated
27 by reference.)
28

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